



June 27, 2001

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 7870-1494

OR2001-2775

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148813.

The Texas Education Agency (the "agency") received a request for all comments filed with the agency addressing the proposed amendments to Chapter 176 of the Texas Administrative Code pertaining to driver training schools including notes and summaries of any oral comments received, all correspondence and other documents related to the proposed rule amendments, and any agency comments or other related material on the proposed amendments. You claim that the submitted information in Exhibits 4 through 9 is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You also advise this office that the requested information may involve the proprietary or property interests of Square Peg Interactive ("Square Peg"), All-Pro Defensive Driving Course, ("All-Pro"), Driver Training Associates, Inc. ("DTA"), USA Training Company, Inc. ("USA"), U.S. Interactive ("Interactive"), and A DriveSafe Workshop ("DriveSafe"). You have submitted copies of letters notifying these companies about the request as required by section 552.305(d). See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

¹In your initial brief, you also asserted section 552.106 of the Government Code. However, you have not provided any written comments stating why section 552.106 would apply to the submitted information. See Gov't Code § 552.301(e)(1)(A). Therefore, we are not addressing section 552.106 of the Government Code in this ruling.

In Open Records Letter No. 2001-2387 (2001), this office determined that Square Peg, All-Pro, and DTA failed to demonstrate that their information was excepted from required disclosure and, therefore, had to be released. Thus, you must also release the information of Square Peg, All-Pro, and DTA to this requestor in accordance with Open Records Letter No. 2001-2387 (2001). As of the date of this letter, we have not received, nor have you forwarded, any reasons from USA or Interactive explaining why its requested information should not be released. Therefore, we have no basis to conclude that USA's or Interactive's information is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

You have, however, forwarded comments submitted by DriveSafe asking that its information not be open to the public and be kept confidential. However, information that is subject to disclosure under the Public Information Act (the "Act") may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986)). Consequently, under the Act, information must fall within an exception to disclosure in order to be withheld from disclosure. DriveSafe has not demonstrated that its information is excepted under the Act. Therefore, you must release the information in Exhibits 2 and 3.

You also claim that information in Exhibits 4 and 5 is excepted under section 552.107(1) of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing the submitted information, we conclude that most of the documents reveal the client's confidential communications or the attorney's legal opinion or advice and are protected by section 552.107(1). However, some portions of the submitted e-mails do not appear to be privileged communications between a client and an attorney. We have marked the information in Exhibit 5 that may not be withheld under section 552.107(1).

You also claim that information in Exhibits 4-9 are excepted under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (emphasis added).

Further, the draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. See Open Records Decision No. 559 (1990). Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

You explain that the documents contain advice, recommendations, and opinions of agency staff regarding agency rulemaking for the regulation of driver training schools. You also state that the submitted information contains internal drafts that reflect the policy judgments of agency staff responsible for providing input on the rules relating to driver training schools. Further, you explain that the drafts will culminate in final rules that will be published in the Texas Register. After reviewing the submitted information, we conclude that most of the information contains advice, recommendations, opinions, and other material reflecting the policymaking processes of the department and, therefore, may be withheld under section 552.111 of the Government Code. Based on your representation that you will release the final form of the submitted drafts, we agree that you may withhold all of the drafts under section 552.111 of the Government Code. We have marked some e-mails in Exhibit 5 which contain purely factual information which you may not withhold under section 552.111 and must be released.

In conclusion, you must release the information in Exhibits 2 and 3 as well as the information we have marked in Exhibit 5. You may withhold the remaining submitted information under sections 552.107 and 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 148813

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